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IN THE

Supreme Court of the United States

OCTOBER TERM—1959

No. 702

JOHN WILLIAM MILLS,

Petitioner,

against

PANAMA CANAL COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX TO BRIEF

	PAGE
Questions Presented	1
Opinion Below	2
Jurisdiction	2
Statement	2
Reasons for Granting the Writ	3
Errors Complained of	3
Argument	3
Conclusion	4

Case Cited

Wagner v. Panama R. Co., 299 N. Y. 432, 87 N. E. 2d 444 (1949)	3

Statutes Cited

28 U. S. C. A. 1254(1)	2
46 U. S. C. A. 688 (Jones Act)	2

INDEX TO APPENDIX

Opinion of the United States Court of Appeals for the Second Circuit	5
Judgment	9

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on November 16, 1959.

Questions Presented

1. Is the conflict of decision between that of the Court below and the decision in the New York Court of Appeals such as to warrant the clarification of the applicable rule of law by the Supreme Court of the United States?

2. Should the choice of forum continue to exist so that a litigant by choosing jurisdiction of the State Court of New York be entitled to different benefits than a litigant in a Federal Court?

Opinion Below

The lower Court held that the petitioner, as a seaman employee of a Government agency enjoying the benefits of the Federal Employees' Compensation Act, had a remedy as against the company under such Act and not under the Jones Act. This opinion is reported at 272 F. 2d 37 (Appendix, pp. 5-8).

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on November 16, 1959.

The jurisdiction of this Court is invoked under 28 U. S. C. A. Section 1254(1).

Statement

Petitioner, a seaman employed by the respondent, brought an action to recover damages for injuries sustained while aboard the S.S. CRISTOBAL on September 24, 1955.

The action was predicated on the provisions of the Jones Act, 46 U. S. C. A. Section 688.

The opinion of the Court below is reported at 272 F. 2d 37. It holds as follows at page 39:

> "As a result of accepting employment with Panama Canal Company plaintiff became, in effect, an employee of the United States and entitled to all the FECA benefits granted to him by congressional enactment. He is not privileged to accept this status and at the same time claim rights which could only be derived through some other and different status."

Reasons for Granting the Writ

The Court of Appeals of the State of New York in the case of *Wagner* v. *Panama R. Co.*, 299 N. Y. 432; 87 N. E. 2d 444 (1949) determined that a seaman injured on the S.S. CRISTOBAL, the same ship involved in this action, was entitled to maintain an action for damages under the Jones Act, and that the Federal Tort Claims Act did not affect such rights even though the S.S. CRISTOBAL was at that time owned by the United States. The accident in this *Wagner* case occurred on March 29, 1947, some short time prior to the enactment of the Federal Employees' Compensation Act involved herein.

There is no distinction between the two cases, except that the New York Court of Appeals has determined that the Jones Act is applicable while the lower Court in this case adopts a contrary conclusion.

This conflict of decision warrants a clarification of the applicable rules of law by this Court.

The Courts of the State of New York must follow the doctrine of the *Wagner* case, thereby permitting an injured seaman to secure different benefits than a similar litigant in a Federal Court.

Errors Complained of

The Court below should have adopted the rule of law of the New York Court of Appeals in the *Wagner* case, *supra*.

Argument

There are two conflicting rules of law applied to identical facts, one by the New York Court of Appeals and the other by the United States Court of Appeals for the Second Circuit.

Conclusion

Under such circumstances, it is respectfully submitted that a Writ of Certiorari be granted so that the issues herein may be fully presented for the determination of this Court.

Respectfully submitted,

JACOB RASSNER,
15 Park Row,
New York, New York,
Attorney for Petitioner.

APPENDIX

(Opinion of the United States Court of Appeals for the Second Circuit)

Before CLARK, Chief Judge, MOORE, Circuit Judge, and SMITH, District Judge.

LEONARD P. MOORE, Circuit Judge.

Plaintiff, a seaman, employed by defendant, brought this action to recover damages for injuries allegedly sustained at the port of Colon, Panama, while performing his duties on the S.S. Cristobal, a vessel owned and operated by defendant. He claims a right to maintain the action under the provisions of the Merchant Marine Act, commonly referred to as the Jones Act (46 U. S. C. A. § 688). Defendant amongst other defenses alleged that the court lacked jurisdiction over defendant and the subject matter of the action because "at the time of the alleged injury, plaintiff was an employee of the Panama Canal Company, a Government corporation, and that by reason thereof plaintiff's sole and exclusive remedy lies under the Federal Employees' Compensation Act, as amended, 5 U. S. C. [A.] § 751 et seq." On this ground defendant moved to dismiss the complaint. The court granted the motion. From the judgment of dismissal, plaintiff appeals.

Defendant, Panama Canal Company, is a corporation the stock of which is wholly owned by the United States, the Secretary of the Army being designated as the sole stockholder. Panama Railroad Company (name changed to Panama Canal Company, Act of September 26, 1950, 64 Stat. 1038) was incorporated under federal charter (Act of June 29, 1948, 62 Stat. 1075).[1] It is the governmental agency through which the United States carries

[1] A predecessor corporation had existed since 1849. The United States acquired all the capital stock during the period of construction of the Canal.

on the functions necessary for the operation and maintenance of the Panama Canal[2]—one of these functions is the ownership and operation of the S.S. Cristobal.

The primary question on appeal is whether plaintiff who as an employee of a governmental agency enjoys the benefits of the Federal Employees' Compensation Act (FECA) may also sue defendant under the Jones Act.

When the FECA was enacted in 1916 it specifically provided that the term "employee" should include employees of the United States and of the Panama Railroad Company." The amendment of 1949 (63 Stat. 854 et seq.) defined "employee" as embracing "employees of instrumentalities of the United States wholly owned by the United States."

Recently the Supreme Court granted certiorari (358 U. S. 898, 79 S. Ct. 223, 3 L. Ed. 2d 148) to resolve a conflict between this circuit and the Eighth Circuit on this very question. In Patterson v. United States, 2 Cir., 1958, 258 F. 2d 702, this court affirmed dismissals of libels filed by employees injured in the course of their employment with the United States while aboard vessels operated by the government and engaged in merchant service on the ground that their exclusive remedy was under the FECA. In Inland Waterways Corp. v. Doyle, 8 Cir., 1953, 204 F. 2d 874, the Eighth Circuit reached a contrary conclusion holding that an employee of a governmental agency although covered by the FECA could also maintain a suit.

The Supreme Court affirmed the dismissals in Patterson, [illegible], 359 U. S. 495, 79 S. Ct. 936, 3 L. Ed. 2d 971, rehearing denied 360 U. S. 914, 79 S. Ct. 1293, 3 L. Ed. 2d 1263, and

[2] For a more extensive statement of the activities of the Panama Railroad [Canal] Company and its governmental character, see People of State of New York ex rel. Rogers v. Graves, 1937, 299 U. S. 401, 57 S. Ct. 269, 81 L. Ed. 306; Panama Canal Co. v. Grace Line, Inc., 1958, 356 U. S. 309, 78 S. Ct. 752, 2 L. Ed. 2d 788.

referred to its decision in Johansen v. United States, 1952, 343 U. S. 427, 72 S. Ct. 849, 96 L. Ed. 1051, to the effect that the exclusive remedy for employees of the United States on government vessels engaged in public service is under the FECA. This conclusion was expanded "to cases where the government vessel is engaged in merchant service" (359 U. S. at page 496, 79 S. Ct. at page 937). The court held that "If civilian seamen employed by the Government are to be accorded rights different from or greater than those which they enjoy under the Compensation Act, it is for Congress to provide them" (359 U. S. at pages 496-497, 79 S. Ct. at page 937) [3]

Plaintiff relies heavily on the decision of the district court in Cordero v. Panama Canal Co., D. C. S. D. N. Y. 1959, 170 F. Supp. 234, wherein the court decided not to follow other decisions to the contrary in the same district (Scott v. Panama Canal Co., D. C. S. D. N. Y. 1959, 170 F. Supp. 737, and Mills v. Panama Canal Co., S. D. N. Y. 1959, Civ. 136-54). The court in Cordero stressed the similarity of the activities of the government corporation, Panama Canal Company, with those of private corporations engaged in similar commercial enterprises. In so doing it looked to the form rather than the substance of the operation. However, the question of who is the employer is not answered by saying a corporation without any inquiry as to the nature of ownership of the corporation. Here the corporation was wholly owned by the government and carrying on an essential governmental activity. The fact that as space permitted passengers and cargo were also carried on defendant's vessels was entirely incidental and secondary

[3] Congress clearly indicated that it did not intend that seamen should have both Compensation Act benefits and the right to suit. See War Shipping Administration Act, 57 Stat. 45, 50 U. S. C. A. Appendix, § 1291. In granting the right to sue it made such seamen ineligible under FECA.

to the main purpose. As to the similarity of method of hiring seamen, namely, through union hiring halls, the form of hiring does not change the character of the employer, the government.

The Cordero case also points to decisions at a much earlier date in which seamen were allowed to sue. However, these cases are not presently controlling. The Supreme Court recognizing the conflict has now resolved it. Having done so with respect to a governmental agency, Inland Waterways Corporation, which was operating a far more commercial business than the Panama Canal Company, its decision in the Patterson case clearly covers the present case.

[1-3] The fact that the government chooses to conduct the affairs relating to the Canal through a corporation does not alter its character as a governmental agency (Cherry Cotton Mills, Inc. v. United States, 1946, 327 U. S. 536, 66 S. Ct. 729, 90 L. Ed. 835, and Federal Crop Ins. Corp. v. Merrill, 1947, 332 U. S. 380, 68 S. Ct. 1, 92 L. Ed. 10. As a result of accepting employment with Panama Canal Company plaintiff became, in effect, an employee of the United States and entitled to all the FECA benefits granted to him by congressional enactment. He is not privileged to accept this status and at the same time claim rights which could only be derived through some other and different status.

The judgment is affirmed.

(Judgment)

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of November, one thousand nine and fifty-nine.

Present:

HON. CHARLES E. CLARK,
Chief Judge,

" LEONARD P. MOORE,
" J. JOSEPH SMITH,
Circuit Judges.

JOHN WILLIAM MILLS,
Plaintiff-Appellant,

—v.—

PANAMA CANAL COMPANY,
Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the Order of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.

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No. 702

In the Supreme Court of the United States

October Term, 1959

JOHN WESLEY HALL, PETITIONER

v.

PARKER CAMERA COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE [illegible] CIRCUIT

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	3
Argument	5
Conclusion	10

CITATIONS

Cases:

Aubrey v. *United States*, 254 F. 2d 768	9
Cordero v. *Panama Canal Company*, 170 F. Supp. 234	5
Feres v. *United States*, 340 U.S. 135	9
Johansen v. *United States*, 343 U.S. 427	4, 5, 7, 8, 9
Lewis v. *United States*, 190 F. 2d 22	9
Maloney v. *State*, 165 N.Y.S. 2d 465	9
McMahon v. *United States*, 342 U.S. 25	8
Panama Canal Co. v. *Grace Line, Inc.*, 356 U.S. 309	4
Patterson v. *United States*, 359 U.S. 495	5, 8, 10
Wagner v. *Panama Railroad Co.*, 299 N.Y. 432, 87 N.E. 2d 444	5–6

Statutes:

Canal Zone Code, Title 2, § 246(a), 62 Stat. 1076	4
Federal Employees' Compensation Act of September 7, 1916, c. 458, 39 Stat. 742, 750	2
Federal Employees' Compensation Act Amendments of October 14, 1949, c. 691, 63 Stat. 854, 860	2
Merchant Marine Act of 1920 (commonly known as the Jones Act), 41 Stat. 1007, 46 U.S.C. 688	3
28 U.S.C. 2680(m), 62 Stat. 984, as amended by the Act of July 16, 1949, 63 Stat. 444, as further amended by the Act of September 26, 1950, 64 Stat. 1038	7

Miscellaneous:

2 Larson, *Workmen's Compensation Law* (1952) § 65.00	9
Note, 14 N. Car. L. Rev. (1936) 199	9
Prosser, *Torts* (1941), p. 543	9
Schneider, *Workmen's Compensation Law* (1941), § 89–154	9

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 702

JOHN WILLIAM MILLS, PETITIONER

v.

PANAMA CANAL COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (Pet. 5–8) is reported at 272 F. 2d 37. The memorandum opinion of the United States District Court for the Southern District of New York is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on November 16, 1959 (Pet. 9). The petition for a writ of certiorari was filed on February 12, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a seaman employed by the Panama Canal Company, who is injured in the course of his duty as a federal employee and is thus entitled to the benefits of the Federal Employees Compensation Act, can sue the Panama Canal Company, an instrumentality of the United States, under the Merchant Marine Act of 1920 (the Jones Act), 46 U.S.C. 688.

STATUTES INVOLVED

1. The pertinent provisions of the Federal Employees' Compensation Act of September 7, 1916, c. 458, 39 Stat. 742, 750, are as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the United States shall pay compensation as hereinafter specified for the disability or death of an employee resulting from a personal injury sustained while in the performance of his duty, but no compensation shall be paid if the injury or death is caused by the willful misconduct of the employee or by the employee's intention to bring about the injury or death of himself or of another, or if intoxication of the injured employee is the proximate cause of the injury or death.
>
> * * * * *
>
> SEC. 40. That wherever used in this Act—
>
> * * * * *
>
> The term "employee" includes all civil employees of the United States and of the Panama Railroad [now Canal] Company.

2. The pertinent provisions of the Federal Employees' Compensation Act Amendments of October 14, 1949, c. 691, 63 Stat. 854, 860, are as follows:

> SEC. 108. (a) Section 40 of the Federal Employees' Compensation Act, as amended (5 U.S.C., 1946 edition, sec. 790), is further amended, by designating the paragraphs thereof, following the introductory phrase, as paragraphs "(a)", "(b)", "(c)", "(d)", "(e)", "(f)", "(g)", and "(h)", respectively.
>
> (b) Paragraph (b) of such section, as so designated, defining the term "employee", is further amended to read as follows:
>
> "(b) The term 'employee' includes (1) all civil officers and employees of all branches of the Government of the United States (including officers and employees of instrumentalities of the United States wholly owned by the United States); * * *."

3. The Merchant Marine Act of 1920 (commonly known as the Jones Act), 41 Stat. 1007, 46 U.S.C. 688, provides that:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States con-

ferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

STATEMENT

Petitioner, a seaman, brought this action against respondent Panama Canal Company for injuries sustained in the course of his employment aboard one of respondent's vessels. Respondent is a wholly-owned instrumentality of the Federal Government, whose prime mission is to provide logistic support for the operation of the Panama Canal.[1]

In his complaint, petitioner alleged that his injuries were the result of respondent's negligence,[2] failure to maintain the vessel in a seaworthy condition, and failure to provide maintenance and cure (R. 2a–4a).[3] Respondent's answer denied negligence and asserted that the District Court lacked jurisdiction over both the defendant and the subject matter because at the time of the injury petitioner's exclusive remedy was the Federal Employees Compensation Act (R. 5a–6a). Respondent also moved to dismiss the complaint (R. 7a) for lack of jurisdiction, urging that this Court's decisions in *Johansen* v. *United States*, 343 U.S. 427,

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[1] All of respondent's stock is held by the President or his designee. Canal Zone Code, Title 2, § 246(a), 62 Stat. 1076. The present designee is the Secretary of the Army. See *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, 311–15.

[2] Petitioner's cause of action for negligence was based on the Jones Act.

[3] "R" refers to the appendix in the Court of Appeals.

and *Patterson* v. *United States*, 359 U.S. 495, conclusively established that the Federal Employees Compensation Act was the exclusive remedy. The District Court granted respondent's motion to dismiss for lack of jurisdiction.

On appeal, petitioner urged adoption of the reasoning employed in *Cordero* v. *Panama Canal Company*, 170 F. Supp. 234 (S.D.N.Y.), which stressed the similarity between operations of the Panama Canal Company and those of private corporations engaged in similar activities, in holding that seamen employed by respondent could invoke the Jones Act as a basis for recovery. The Court of Appeals, however, expressly rejected *Cordero*, on the ground that the "fact that the government chooses to conduct the affairs relating to the Canal through a corporation does not alter its character as a governmental agency" (Pet. 8). Relying on the rulings of this Court in *Johansen*, *supra*, and *Patterson*, *supra*, the Court of Appeals affirmed the District Court's decision.

ARGUMENT

1. Petitioner does not expressly challenge the conclusion of both courts below that his sole remedy lies under the Federal Employees Compensation Act. Rather, he concentrates on the allegation that a conflict now exists between the decision in his case and an earlier ruling of the New York Court of Appeals in *Wagner* v. *Panama Railroad Co.*, 299 N.Y. 432, 87 N.E. 2d 444 (1949). But this asserted conflict presents no basis for certiorari.

Wagner involved a Jones Act suit brought by a merchant seaman against respondent's predecessor

corporation, Panama Railroad Company, in which the plaintiff claimed damages for injuries suffered in the course of his employment aboard one of respondent's vessels. Private counsel defending the Panama Railroad Company replied that the suit was, in reality, one against the United States and that the state court was without jurisdiction because Wagner's sole remedy lay under the Federal Tort Claims Act. The New York Court of Appeals refused to hold that the Tort Claims Act was the plaintiff's exclusive remedy and allowed use of the Jones Act as a basis for recovery.[4]

While *Wagner* thus has a factual similarity to the instant case, its holding does not directly contradict the ruling of the Second Circuit below, and there is now no occasion to consider any divergencies in theory. The question in *Wagner* was whether a seaman employed by the Panama Canal Company's predecessor was limited to the Federal Tort Claims Act as his sole basis of recovery for injuries received in the course of employment. That issue was conclusively settled a short time after *Wagner* when Congress specifically amended the Tort Claims Act to bar

[4] In a separate concurring opinion, three of the members of the court argued that the negligence claim should have been dismissed. They reasoned that Jones Act claims were not among those which Congress had specifically preserved apart from the Tort Claims Act, and that there was "no justification for rewriting it by inserting an exception which—for all we know—Congress may have designedly and deliberately omitted." 299 N.Y. at 442; 87 N.E. 2d at 449. However, the concurring opinion did find that Wagner's claims for unseaworthiness and maintenance and cure were not eliminated by the Tort Claims Act and, hence, were proper for adjudication in the state courts.

suit against the Panama Canal Company.[5] After this amendment, it was clear that a seaman employed by the Company could not rely on the Federal Tort Claims Act in a suit against respondent. On the other hand, the question of whether the Federal Employees Compensation Act was intended to be the exclusive remedy in such a case—the problem in the present case—was neither raised nor discussed in *Wagner*, and certainly that decision is not a holding in favor of petitioner's position.[6]

2. In any event, whatever tangential effect *Wagner* may have had on the larger question of the choice of remedies available to seamen employed by the Federal Government was completely nullified by this Court's decisions in *Johansen* and *Patterson, supra.*

In *Johansen* it was held that the Federal Employees Compensation Act is the "exclusive remedy" for civilian employees of the United States on Government vessels engaged in public service and that the United States was, therefore, not liable to such employees under the Public Vessels Act, 343 U.S. at 441. The rationale of the Court was that the United States "has established by the Compensation Act a method of redress for employees. There is no reason to have two systems of redress." *Id.* at 439. *Patterson*, decided at the last Term, applied the same

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[5] The amendment originally applied to the Panama Railway Company, but was further amended in 1950 to substitute the name of its successor in title, Panama Canal Company. 28 U.S.C. 2680(m), 62 Stat. 984, as amended by the Act of July 16, 1949, 63 Stat. 444, as further amended by the Act of September 26, 1950, 64 Stat. 1038.

[6] See also footnote 7, *infra*, p. 9.

reasoning to cover claims brought under the Suits in Admiralty Act by seamen employed on Government vessels engaged in maritime service.

Petitioner and the plaintiffs in *Johansen* and *Patterson* have in common that all relied on the Jones Act as a basis for recovery on their claims of negligence. Until the passage of the Jones Act, seamen did not have such a right of recovery against their employers for injuries sustained in the course of duty. However, while the Jones Act gave seamen a cause of action for negligence against their employers, it was not a substitute for the requirement of jurisdiction over the parties nor did it operate as a waiver of sovereign immunity. Thus, in *Johansen* and *Patterson*, the plaintiffs had to unite their causes of action under the Jones Act with a showing that Government had waived its sovereign immunity to suit. To that end they invoked the waivers found in the Public Vessels Act and the Suits in Admiralty Act. As grants of the right to sue the Government must be strictly construed in context (*McMahon* v. *United States*, 342 U.S. 25, 27), the Court examined the intent and wording of these statutes and compared them with the history and language of the Compensation Act. It concluded that neither the Public Vessels Act nor the Suits in Admiralty Act should be read to support a Jones Act suit brought against the United States by one of its employees.

In such a case the issue is the extent to which the Government has, in its capacity as an employer, agreed to compensate its employees for their injuries. That consent is clearly set out in the Compensation

Act and is distinct from the waiver extended to shippers and passengers by the Government in its capacity as an owner or operator of vessels. As this Court found in *Johansen*, the comprehensive and uniform character of the Compensation Act compels the conclusion that it was intended to be exclusive, and absent specific exception must be so construed. 343 U.S. at 439–441.[7]

As in *Johansen* and *Patterson*, the question in the instant case is whether a waiver of sovereign immunity will support a Jones Act suit in the face of the clear congressional intent that the Compensation Act be the exclusive remedy for federal employees. The only distinction in this case is that the "sue or be sued" clause of the respondent's charter has been substituted by petitioner for the earlier reliance by Johansen and Patterson on the waivers in the Public Vessels Act and the Suits in Admiralty Act. There is no variation, however, in the critical fact that petitioner, just as the plaintiffs in *Johansen* and *Patterson*, was covered by the Compensation Act at the time of his

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[7] This conclusion was in accord with the general rule concerning compensation statutes, *i.e.*, that, unless the statute is by its terms elective, the compensation rights provided are deemed to be exclusive wherever the statute is applicable. Cf. *Feres* v. *United States*, 340 U.S. 135; *Aubrey* v. *United States* 254 F. 2d 768 (C.A.D.C.); *Lewis* v. *United States*, 190 F. 2d 22 (C.A.D.C.); see also, 2 Larson, *Workmen's Compensation Law* (1952), § 65.00; Schneider, *Workmen's Compensation Law* (1941), §§ 89–154; Prosser, *Torts* (1941), p. 543; Note, 14 N. Car. L. Rev. (1936) 199.

The New York Court of Appeals has held, in an action brought under the Jones Act by a seamen employed by the state, that the State Compensation Act is his exclusive remedy. See *Maloney* v. *State*, 165 N.Y.S. 2d 465 (1957).

injury. Thus, the courts below correctly held that the rationale and holdings of this Court in *Johansen* and *Patterson* are squarely in point and bar petitioner's present action against respondent, not only his Jones Act suit for negligence but also the additional counts of unseaworthiness and maintenance and cure. Petitioner has not presented any new considerations which would overcome the observation in *Patterson* that, "If civilian seamen employed by the Government are to be accorded rights different from or greater than those which they enjoy under the Compensation Act, it is for Congress to provide them." 359 U.S. at 496–497.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
GEORGE COCHRAN DOUB,
Assistant Attorney General.
SAMUEL D. SLADE,
RONALD A. JACKS,
Attorneys.

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